

CASE NO. DA 09-0601

IN THE SUPREME COURT OF THE STATE OF MONTANA

PHYLLIS JAMISON,

Plaintiff/Appellant,

-VS.-

FRED VAN VALKENBURG, MISSOULA COUNTY COMMISSION,
BILL CAREY, COMMISSIONER, JEAN CURTISS, COMMISSIONER,
JAMES MCCUBBIN, DEPUTY COUNTY ATTORNEY, DENA L. LUND,
JACK S. LUND, RICHARD B. WHEATLEY, TAMBRY T. WHEATLEY,

Defendants/Appellees.

On Appeal from the Montana Fourth Judicial District,
Missoula County, The Honorable Ed McLean Presiding,
Missoula County District Court Cause No. DV-08-1047

BRIEF OF APPELLEES DENA L. LUND AND JACK S. LUND

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court's order of dismissal and judgment for Defendants Dena L. Lund and Jack S. Lund should be affirmed for failure to state a claim on which relief can be granted under Mont. R. Civ. P. 12(b)(6).

II. STATEMENT OF THE CASE

Phyllis Jamison commenced this action by filing a *pro se* Complaint on August 19, 2008. Jamison named 16 defendants in her complaint, including Dena and Jack Lund (Lunds), Missoula County, and various county officials, including Missoula County Attorney Fred Van Valkenburg.¹

The complaint made many shotgun-allegations against county officials that had no connection with or relationship to the Lunds. For example, the complaint alleged that county officials: 1) violated open meeting laws by holding closed and secret meetings; 2) made defamatory and slanderous statements about Jamison; and 3) retaliated against Jamison for urging the

¹ A complete list of the named defendants appears on pages 11 of 13, and 12 of 13 of the Complaint. In addition to the Lunds and Missoula County and Fred Van Valkenburg, the list includes the Missoula County Commission and Commissioners Bill Anderson, Barbara Evans, Bill Carey, Jean Curtiss, Chief Civil County Attorney Michael Sehestedt, Deputy County Attorney James McCubbin, Director of Public Works Gregory Robertson, Asst. Director of Public Works-Surveyor Charles Wright, Missoula County Survey Party Chief Steve Niday, Missoula City-County Health Department, Director of Missoula City-County Environmental Health/Animal Control Jim Carlson, the Missoula City-County Animal Control Shelter and its Supervisor Ed Franceschina.

county to accept stray cats into its animal shelter. *Id.* pp. 4, 7 and 8. For relief against Missoula County and its officials, Jamison's complaint asked the Court to order the county to plow and sand the county road on which she resides, Woodville Avenue in Clinton, Montana, whenever other roads in the neighborhood are plowed and sanded.. *Id.* p. 10.

Jamison's complaint alleged breach of a written contract as the sole cause of action against the Lunds. *Id.* p. 1. Jamison attached a copy of the contract to her complaint as Exhibit B. The complaint alleged that the Lunds, who are neighbors of Jamison, breached this contract by constructing fences, buildings and a septic system on the Woodville Avenue right-of-way. *Id.* For relief against the Lunds, the complaint requested the court to order removal of the Lunds' fences, buildings and septic system from the right of way. *Id.* p. 3.

On September 15, 2008, the Lunds filed as their first appearance a motion to dismiss the complaint for failure to state a claim on which relief could be granted under Mont. R. Civ. P. 12(b)(6), or alternatively a motion for more definite statement under Rule 12(e), and motion for separate trials of the claims against the Lunds from the claims against the other Defendants under Rule 42(b). The motions were supported by a brief filed five working days later on September 22, 2008.

Jamison did not file a brief in response to the Lunds' motions. Instead, on September 29, 2008, she filed a motion for a 90-day extension of time to serve an amended complaint.

On December 29, 2008, Jamison filed a second motion for extension of time to serve an amended complaint. In granting this second motion for extension, the district court, in its order of January 16, 2009, stated in part that "Plaintiff Phyllis Jamison is advised that if she does not file the proper pleading by January 20, 2009, the Court will rule on the pleading presently in the file."

Jamison filed an amended complaint on January 20, 2009. The amended complaint essentially made the same operative allegations against the Lunds as set forth in the original complaint, and also requested the same relief as the original complaint - an injunction for removal of the Lunds' septic system, fences and storage buildings which were alleged to constitute encroachments on the Woodville Avenue right-of-way. *Amend. Compl.* at p. 11.

The district court did not rule on the Lunds' September 15, 2008 motions. Therefore, on May 8, 2009, the Lunds filed a motion and supporting brief to dismiss the amended complaint for failure to state a claim on which relief could be granted.

Jamison did not file a brief in response to the Lunds' motion to dismiss the amended complaint. On July 6, 2009, the district court entered an order dismissing all claims against all Defendants for failure to state a claim on which relief could be granted under Mont. R. Civ. P. 12. The court reasoned that under the terms of the written agreement attached to the original complaint as Exhibit B, Missoula County had contractually agreed to abandon to the Lunds a small section of right-of-way along Woodville Avenue where the Lunds' septic system was located, that such abandonment was within the county's legal authority to do, and that the legal effect of the abandonment was to revert ownership of the property to the Lunds. *Id.*, pp. 1-2. The court further noted that Jamison had not cited any legal authority giving her the right as a private citizen to seek an injunction against the county to force it to rescind its abandonment of the right-of-way, or to prevent the Lunds from placing fencing, trees or structures on that part of the right-of-way which the county had contractually agreed to abandon to the Lunds. *Id.*, p. 2.

It is submitted Jamison is not entitled to the relief she requests based on any set of facts that she could prove to support her claim. Therefore, the court's order of dismissal and judgment for the Lunds should be affirmed for

failure to state a claim on which relief can be granted under Mont. R. Civ. P. 12(b)(6).

III. STATEMENT OF FACTS

The Lunds purchased their home and property in Clinton, Montana in 2002. The property borders Woodville Avenue roughly to the west. Like other homes in the area, the Lunds' home was serviced by a septic system and drain field.

The Lunds' septic system failed in 2006, four years after they bought the property. They accordingly submitted an application to the Missoula City/County Health Department for a Replacement Septic System Permit. A permit was issued on September 25, 2006. The permit approved installation of a replacement system in the same location as the old one. The Lunds installed the new system, in the same location as the old one, on October 11, 2006.

By letter dated December 6, 2006, the Missoula City/County Health Department notified the Lunds that the replacement system could not be approved because of its location partly within the Woodville Avenue right-of-way. The letter advised the Lunds that they would need to either: 1) obtain an easement from the county for permission to leave the replacement system on the county right-of-way as installed; 2) have the county abandon that portion of

the right-of-way on which the replacement system had been installed; or 3) install a new system entirely on the Lunds' property.

The Lunds asked the county to abandon the narrow strip of right-of-way on which their replacement system had been installed. In response, Missoula Deputy County Attorney James McCubbin sought to obtain the written consent of Tambry and Richard Wheatley, whose property borders Woodville Avenue roughly to the east, and obtain the written consent of Plaintiff Phyllis Jamison, whose property borders Woodville Avenue roughly to the south.

The Wheatleys consented to the proposed abandonment. Jamison conditionally consented. Before she would agree to the proposed abandonment, she demanded that the Lunds first remove a shed and a fence located on the south end of Lunds' property. She also demanded that the Lunds pay for the removal of three large Ponderosa Pine trees located on the Woodville Avenue right-of-way near Jamison's property. The Lunds agreed to these conditions. All of this was incorporated into a written agreement dated April 13, 2007, which was drafted by McCubbin. The agreement, a copy of which is attached to Jamison's original complaint as Exhibit B, was signed by Jamison, the Lunds, the Wheatleys, and by McCubbin as Deputy County Attorney for Missoula County.

After the agreement was signed, the Lunds performed all of the conditions that Jamison had demanded. The Lunds removed their shed and fence from the right-of-way area south of their property. They moved the shed onto the right-of-way area that the parties agreed would be abandoned to the Lunds, and they built a short section of privacy fence on this area. The Lunds also paid to have the three Ponderosa Pine trees cut down from the right-of-way, as Jamison had demanded

Jamison failed to fulfill her part of the bargain. Instead of consenting to the proposed abandonment pursuant to the terms of the April 13, 2007 agreement, she filed this lawsuit requesting the court to order the Lunds to remove their newly installed septic system, storage sheds and privacy fence from the Woodville Avenue right-of-way.

IV. STANDARD OF REVIEW

A district court's ruling on a Rule 12(b)(6) motion to dismiss is reviewed de novo. *Snyder v. Love*, 2006 MT 317, ¶ 7, 335 Mont. 49, 153 P.3d 571. “A motion to dismiss under Rule 12(b)(6), M. R. Civ. P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.” *Orr v.*

State, 2004 MT 354, ¶ 9, 324 Mont. 391, 106 P.3d 100. The district court's dismissal will be affirmed if the Court concludes that the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim. *Id.* The determination of whether a complaint states a claim is a conclusion of law, and the district court's conclusions of law are reviewed for correctness. *Id.* Additionally, the Court will affirm a district court's ruling if the district court reaches the correct result, even if for the wrong reason.

Camarillo v. State, 2005 MT 29, ¶ 19, 326 Mont. 35, 107 P.3d 1265.

V. ARGUMENT

A. Summary of the Argument.

The district court correctly concluded in its order of July 6, 2009 that under the terms of the written agreement attached to the original complaint as Exhibit B, Missoula County contractually agreed to abandon to the Lunds a small section of right-of-way along Woodville Avenue where the Lunds' septic system was located, that such abandonment was within the county's legal authority to do, and that the legal effect of the abandonment was to revert ownership of the property to the Lunds. The court also properly concluded that Jamison has not cited any legal authority giving her the right, as a private citizen, to seek an injunction against the county to force it to rescind its

abandonment of the right-of-way, or to prevent the Lunds from placing fencing, trees or structures on that part of the right-of-way, which the county contractually agreed to abandon to the Lunds.

B. Missoula County Contractually Agreed to Abandon to the Lunds that Portion of the Woodville Avenue Right-Of-Way on Which Their Septic System, Storage Shed and Privacy Fence Are Located.

On September 25, 2006, the Missoula City/County Health Department issued a permit to the Lunds to replace their septic system, and to install the new system in the same location as the old one. Some time after the Lunds completed installation of the new system, in the same location as the old one, the county discovered that the system encroached on the Woodville Avenue right-of-way.

Missoula Deputy County Attorney James McCubbin negotiated a reasonable and practical solution. He obtained the written consent of the adjoining landowners of Woodville Avenue, including that of Plaintiff Phyllis Jamison, Tambry and Richard Wheatley, and Jack and Dena Lund, to allow the county to abandon to the Lunds the small portion of right-of-way on which the Lunds' new septic system had been installed.

Jamison received valuable consideration in exchange for giving her written consent to the abandonment. Before consenting to the proposed

abandonment, she insisted that the Lunds remove a shed and a fence located on the Woodville Avenue right-of-way south of Lunds' property. Jamison also insisted that the Lunds pay for the removal of three large Ponderosa pine trees located on the Woodville Avenue right-of-way near the Plaintiff's property. These conditions were incorporated into the written agreement attached to Jamison's complaint.

The Lunds gave valuable consideration to Jamison in exchange for her consent to the abandonment. The Lunds performed all of the conditions that Jamison demanded. They removed their storage shed and fence from the right-of-way area south of their property. The Lunds also paid to have three large Ponderosa Pine trees cut down from the right-of-way adjacent to Jamison's property, as Jamison demanded.

After receiving this valuable consideration from the Lunds in exchange for her consent to abandon the right-of-way, Jamison now improperly seeks to have the agreement declared a nullity based on the patently false assertion that she lacked any bargaining power, and that all of the terms of the agreement were dictated to her. Jamison bargained for and received the removal of the Lunds' fence and shed on the south end of their property, and she bargained for

and received the removal of three large Ponderosa Pine trees that the Lunds paid to have cut down from the right-of-way adjacent to Jamison's property.

The only relief that Jamison requests against the Lunds by her amended complaint is an injunction for removal of the Lunds' septic system, fences and storage shed from the Woodville Avenue right-of-way. An injunction is an equitable remedy. *McKay v. Wilderness Development, LLC*, 2009 MT 410, ¶ 94, 353 Mont. 471, 221 P.3d 1184. One who seeks equity must do equity, and may not come to come into court with unclean hands. *Id.* Under Montana law this means that a person may not obtain benefits from violation of a contract while at the same time pursuing prosecution of another person for violation of the same contract provision.

Jamison comes into court with unclean hands. After accepting the benefits from the written contract of April 13, 2007, she now improperly seeks to prosecute the Lunds for alleged breach of those very same contract provisions. However, as demonstrated in Missoula County's response brief, the Lunds have fully complied with the terms of the contract. Jamison's suit

against the Lunds appears to be nothing more than a transparent attempt to force Missoula County to maintain her driveway.²

It is true, as Jamison states in her brief, that the Missoula County Commissioners have yet to take a vote on the proposed abandonment to the Lunds. As Missoula County notes in its brief, the Commissioners are prepared to take this final step, but have chosen to delay action until Jamison's lawsuit is resolved. As the sole benefit of their bargain with all of the parties to the April 13, 2007 agreement, the Lunds are entitled to receive the Commissioners' approval of the proposed abandonment pursuant to Mont. Code Ann. § 7-14-2615.

C. Jamison Has No Standing To Seek Injunctive Relief Against the Lunds.

The Woodville Avenue right-of-way is a public right-of-way owned by Missoula County. The sole remedy that Jamison has requested against the Lunds is an injunction for removal of the Lunds' septic system, fence and storage buildings from this right-of-way. This raises a legal issue as to whether a private citizen has standing to sue for an injunction requiring removal of

² It should also be noted that Jamison never filed a brief in response to the Lunds' September 15, 2008 motion to dismiss, or the Lunds' May 8, 2009 motion to dismiss. Under Rule 2(b), Uniform District Court Rules, Jamison's failure to file an answer brief to either motion is an admission that the motion is well taken.

encroachments from a public right-of-way. The answer to that question is clearly “no.” Jamison does not have standing to seek injunctive relief against the Lunds under the law applicable to the facts of this case.

The standards for determining when injunctive relief is appropriate are codified in Montana statutory law. Montana Code Ann. § 27-19-102 sets forth the circumstances under which a court may grant a final injunction:

27-19-102. When final injunction may be granted to prevent breach of obligation. Except where otherwise provided by the provisions of the code governing specific and preventive relief (chapter 1, part 4, of this title and Title 28, chapter 2, parts 16 and 17), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where:

- (1) pecuniary compensation would not afford adequate relief;
- (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
- (3) the restraint is necessary to prevent a multiplicity of judicial proceedings; or
- (4) the obligation arises from a trust.

Montana Code Ann. § 27-19-103 spells out the circumstances in which a court may not grant an injunction:

27-19-103. When injunction may not be granted. An injunction cannot be granted:

- (1) to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;
- (2) to stay proceedings in a court of the United States;
- (3) to stay proceedings in another state upon a judgment of a court of that state;
- (4) to prevent the execution of a public statute by officers of the law for the public benefit;
- (5) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (6) to prevent the exercise of a public or private office, in a lawful manner, by the person in possession;
- (7) to prevent a legislative act by a municipal corporation;
- (8) in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character or between parties neither or none of whom were laborers or interested in labor questions.

Injunctions are both extraordinary and equitable in nature. They are extraordinary in that they are to be granted only where irreparable harm is conclusively demonstrated. *Dicken v. Shaw*, 255 Mont. 231, 236, 841 P.2d 1126, 1129 (1992). They are to be granted only with caution and in the exercise of sound judicial discretion. *Trogia v. Bartolett*, 152 Mont. 365, 370, 451 P.2d 106, 109 (1969). Irreparable harm does not exist where money

damages would afford adequate relief. *Dicken*, 255 Mont. at 236, 841 P.2d at 1129.

In the present case Jamison is unable to show any damage, much less irreparable harm, from the Lunds' alleged encroachments on the Woodville Avenue right-of-way. The encroachments are not located in the road that provides access to Jamison's property. All encroachments are located off the road, in the right-of-way area that all parties have previously agreed, pursuant to their written agreement of April 13, 2007, is to be abandoned by Missoula County to the Lunds.

The encroachments do not interfere with Jamison's access to her property in any way, nor do they interfere with Jamison's use or enjoyment of her property. The newly installed replacement septic system is located in the same place as the old one, and the old system was in that location long before the Lunds purchased the property in 2002. The privacy fence was constructed as a buffer between the Lunds' home and traffic on Woodville Avenue. In accordance with Jamison's demand, the Lunds removed a fence and the storage shed from the south border of their property. The storage shed was relocated farther away from Jamison's property, onto the right-of-way area which all parties have contractually agreed is to be abandoned to the Lunds under the

April 13, 2007 agreement. Jamison cannot show she has been harmed in any way, let alone irreparably harmed, by the Lunds' alleged encroachments on the county's right-of-way.

Under Montana law, a private individual lacks standing to maintain an action for an encroachment on a public right-of-way, unless the individual suffers or is threatened with some special, particular or peculiar injury growing out of the encroachment. *Faucette v. Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646, 648-49 (1928). To be actionable, the injury to an individual must be different in kind and not merely in degree from the injury to the public at large, and the injury must also be substantial and irreparable in nature. *Id.*

Jamison's amended complaint fails to satisfy these requirements. The amended complaint does not allege any special, particular or peculiar injury to Jamison growing out of the Lunds' alleged encroachments on the Woodville Avenue right-of-way. Nor does the amended complaint allege a substantial or irreparable injury of any kind to Jamison. At most, only slight, doubtful and speculative injury is alleged.

This is not a case in which a governmental entity is seeking to remove an encroachment on public property. Instead, Missoula County, the governmental agency which owns the public property involved in this case, is seeking to do

just the opposite. It has contractually agreed to abandon a small portion of its right-of-way so that the Lunds do not have to incur the needless expense of relocating their septic system.

This is also not a case in which one person's property encroaches on the private property of another. Jamison does not allege that the Lunds' property encroaches on her own property, but only that Lunds' property encroaches on a public right-of-way. Even in cases of the former type, injunctive relief is frequently denied, as illustrated by *Gelderloos v. Duke*, 2004 MT 94, 321 Mont. 1, 88 P.3d 814. In *Gelderloos*, the eaves and foundation of one property owner's home encroached onto the private property of another. The Montana Supreme Court there held that in light of this "*de minimus* encroachment," an injunction requiring removal of the encroachments would be improper. *Id.*, ¶ 41.

Other jurisdictions are in agreement that injunctive relief must be granted sparingly because of the drastic character of such a remedy. And because injunctive relief is equitable in nature, courts must carefully balance the equities of the case in determining whether an injunction should issue:

The extraordinary nature of the remedy by injunction calls for a particular application of equitable principles, and it may be said to be the duty of the court to consider and weigh the relative

conveniences and comparative injuries to the parties which would result from the granting refusal of injunctive relief. Because of the drastic character of mandatory injunctions, such rules apply with special force to them.

The facts which will warrant mandatory relief must be clear, be free from reasonable doubt, and disclose the prospect of irreparable injury to the complainant. Equity will not interfere where the anticipated injury is doubtful or speculative; reasonable probability of irreparable injury must be shown. Such relief will be refused where the injury is so slight as to bring the case within the maxim “de minimis non curat lex,” where there is no appreciable damage, where a mandatory decree would require a difficult and expensive act, or where its enforcement would necessitate close and continuous supervision by the court for an indefinite period. As in other cases of injunction, the court will balance the equities between the parties and consider the benefit to the plaintiff of a mandatory writ as against the inconvenience and damage to the defendant, and award relief accordingly.

Miller v. City of W. Carrollton, 632 N.E.2d 582, 586 (Ohio App. 1993).

D. Injunctive Relief Is Not Available To Prevent Breach Of Contract.

On page 5 of her amended complaint Jamison alleges that the Lunds breached the written agreement of April 13, 2007 by constructing fences and buildings on the Woodville Avenue right-of-way. She alleges that the Lunds’ construction of the fences and buildings constitutes breach of the provision on page 1 of the agreement that “Lunds shall not construct anything in the road right-of-way,” as well as breach of the provision on page 2 that “Lunds shall

not in the future encroach in any way upon the remaining Woodville Avenue right-of-way.”

Mont. Code Ann. § 27-19-103(5) prohibits a court from granting an injunction “to prevent the breach of a contract the performance of which would not be specifically enforced.” In considering this statutory provision, this Court has previously declared that “[i]njunctive remedies are rarely used to enforce contract rights or prevent breaches.” *Westland Enterprises, Inc. v. Boyne U.S.A., Inc.*, 237 Mont. 186, 191, 772 P.2d 309, 312 (1989). The Court noted that Mont. Code Ann. § 27-1-412 contains a list of obligations which cannot be specifically enforced, and that the list includes “an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.” *Id.*

This Court in *Westland* reversed the district court’s grant of an injunction for alleged breach of contract. The Court reasoned that “[t]he precise acts to be carried out by Boyne cannot be ascertained from the contract itself or the record of this case.” *Id.*, 237 Mont. at 192, 772 P.2d at 313. The Court thus concluded that § 27-1-412 prohibited specific performance of Boyne’s obligations under the contract, and that accordingly, “[t]he [district] court’s

injunction requiring expansion of the plant to prevent a possible breach by Boyne was improper.” *Id.*

In the present case, as in *Westland*, it would be improper for the district court to issue an injunction as requested by Jamison. The April 13, 2007 agreement does not prohibit the Lunds from constructing fences or storage sheds on that portion of the right-of-way which is to be abandoned to them under the agreement. Rather, the agreement prohibits the Lunds from constructing fences or storage sheds on any part of the Woodville Avenue right-of-way other than the portion which is to be abandoned to them under the agreement.

The Lunds have fully complied with all conditions of the agreement. The property on which their septic system, fence and storage sheds are located is fully within that portion of the right-of-way to be abandoned to them under the terms of the agreement. This is demonstrated by the fact that Missoula County, as both the owner of the right-of-way and the author of the April 13, 2007 agreement, continues to stand ready to perform in accordance with the terms of the agreement by acknowledging in its brief that it intends to seek the Commissioners’ approval of the proposed abandonment to the Lunds after this lawsuit by Jamison is resolved.

VI. CONCLUSION

Jamison's amended complaint seeks injunctive relief in the form of an order requiring Lunds to remove all of their alleged encroachments from the Woodville Avenue right-of-way. Montana law prohibits the district court from granting such injunctive relief for several reasons.

First, all concerned parties, including Jamison, the Lunds, the Wheatleys and Missoula County, have contractually agreed to abandon to the Lunds that portion of the Woodville Avenue right-of-way on their septic system, storage shed and privacy fence are located. Jamison bargained for and received valuable consideration in exchange for consenting to the abandonment, and the April 13, 2007 agreement is therefore binding upon her. Second, Jamison lacks standing to request injunctive relief unless she alleges and proves not only a substantial injury to her, but also a special, particular or peculiar injury growing out of the alleged encroachments. Jamison has not even alleged, much less shown, any such injury. Third, the record does not support Jamison's allegation of the Lunds' breach of the April 13, 2007 agreement.

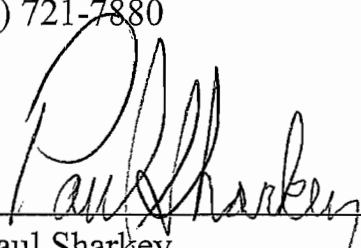
This is a frivolous lawsuit filed by Jamison to coerce Missoula County into agreeing to plow the road leading to her property. For all of the foregoing reasons, the district court's July 6, 2009 order of dismissal of Jamison's

amended complaint should be affirmed for failure to state a claim on which relief can be granted under Mont. R. Civ. P. 12(b)(6).

DATED this 6th day of July, 2010.

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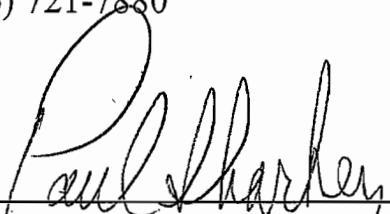
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this ***Brief of Appellees Dena L. Lund and Jack S. Lund*** is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced; and the word count calculated by Corel WordPerfect for Windows is 4656 words pursuant to Montana Rules of Appellate Procedure 11(4), not averaging more than 280 words per page, excluding Certificate of Compliance and Certificate of Service.

DATED this 6th day of July, 2010.

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CERTIFICATE OF MAILING

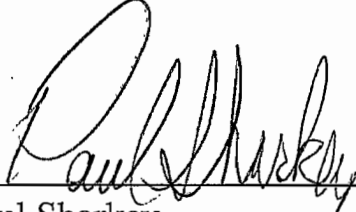
I, Paul Sharkey, one of the attorneys for Appellee Associated Materials, Inc. in the above-entitled action, hereby certify that on the 6th day of July, 2010, I served the within ***Brief of Appellees Dena L. Lund and Jack S. Lund*** upon the attorneys of record by mailing one copy thereof, to each party represented, in an envelope, securely sealed, postage prepaid and addressed as follows:

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